2.3.1 – facts that demonstrate the *bona fides* of the application which could be by a statement of the circumstances that had resulted in the whereabouts of the person to be served not being known;

2.3.2 – the belief and the reason for such belief that the person to be served is within or outside the jurisdiction of the court;

2.3.3 – proposals for the manner in which the substituted service is to be effected having in mind that the intention is that the person to be served will thereby probably get to hear of the proceedings.

In the instant case the affidavits read in support of the application show that enquiries made at the last known address have resulted in the belief that the defendant had ceased to reside or carry on business there and that her whereabouts are not known. The affidavits show that the defendant is a Malaysian citizen. Her name suggests that she is a Tamil. There was no reason to suggest that she is out of the jurisdiction.

Clearly, Practice Note No. 1 of 1968 has no application in this case. The appeal is allowed. The application for substituted serivce is allowed. The bankruptcy notice may be served by substituted service by posting copies thereof together with a copy of the order made hereby on the notice board of the court and by advertisement in one issue of the *New Straits Times* and, the debtor being a Tamil, the *Tamil Nesan* as well and that such posting and advertisement be deemed good and sufficient service on the judgment debtor of the bankruptcy notice seven days after such posting and advertisement. The time limited for the service of the bankruptcy notice is extended up to December 31, 1986.

Appeal allowed.

Solicitors: *Syarikat S. Sothi.*

PUBLIC BANK BERHAD v. HARA INDUSTRIES SDN. BHD. & ANOR

[O.C.J. (V.C. George J.) September 16, 1986]

[Kuala Lumpur – Civil Suit No. 7652 of 1985]

Civil Procedure – Judgment debts – Interest to be awarded – What is the rate of interest – R.H.C. 1980, O. 42 r. 12.

The primary issue in this application to set aside a judgment entered in default of appearance turned on the question of the extent of the jurisdiction of the court to award interest on judgment sums.

In the present case, the rate of interest awarded on the judgment sum was 9% per annum.

Held, *inter alia:* under the Rules of the High Court 1980, the rate of interest on judgment sums is 8% regardless of whether there was an agreement between the parties on the rate of interest. The interest is awarded from the date of judgment to the date of realization of the judgment sum.

Cases referred to:

(1) *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* [1893] A.C. 429.
(2) *Page* v. *Newman* 9 B. & C. 378; 109 E.R. 140.
(3) *Armitage* v. *Parsons* [1908] 2 K.B. 410.
(4) *Hughes* v. *Justin* [1894] 1 Q.B. 667.

APPLICATION.

Patrick Koo for the applicant/defendant.

Cik Juliana Solomon for the respondent/plaintiff.

Cur. Adv. Vult.

V.C. George J.: The primary issue in this application to set aside a judgment entered in default of appearance turned on the question of the extent of the jurisdiction of the court to award interest on judgment sums.

The plaintiff bank claimed $15,473.42 said to be the amount outstanding on an overdraft account "inclusive of interest as at September 26, 1985" and a further amount of $73,677.40 said to be the amount outstanding in respect of trust receipts "inclusive of interest as at September 26, 1985" and prayed judgment for these amounts together with interest thereon calculated at 9% from September 27, 1985 until realization. The rate and the basis of the imposition of interest up to September 26, 1985 and the basis for seeking interest at 9% per annum from September 27, 1985 were not disclosed. Upon default of appearance, judgment as prayed was entered against the first defendant.

In *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.*[1] Lord Herschell L.C. at p. 439 and Lord Watson at p. 441 accepted as the common law rule in respect of the awarding of interest that which was laid down by Lord Tenterden L.C. in *Page* v. *Newman.*[2] The rule was that interest could be ordered to be paid by the court where there was express agreement to pay interest or where an agreement to pay interest could be implied. But it would appear that interest was to be calculated only up to the date of judgment. There were no provisions or practice at common law for awarding interest on judgment debts. In England, judgment debts did not carry interest until statutory provisions for that purpose were enacted.

In Malaysia, section 16 (read with section 17) of the Courts of Judicature Act 1964 provides for rules of court to be made by the Rules Committee for the various purposes set down in section 16, one of which is item (i) therein which is in respect of the regulating of the rate of interest payable, *inter alia,* on all debts including judgment debts. There is a proviso to this item which is as follows:

"Provided that in no case shall any rate of interest exceed eight per centum per annum, unless it has been otherwise agreed between the parties."

Section 16 is an enabling provision and the proviso to item (i) prescribes a ceiling to the rate of interest that the Rules committee may allow the courts to award. The ceiling is 8% per annum. However, the proviso makes it clear that the Rules Committee is not bound by the ceiling of 8% per annum in cases where the parties have an agreement in respect of the rate of interest payable. Where the parties do not have an agreement in respect of interest, the 8% per annum rate was the maximum that the Rules Committee could prescribe. It could prescribe a lesser rate. But where there was an agreement in respect of the rate of interest between the parties, there was no clog to the Rules Committee's discretion. They could prescribe any rate of interest they chose. It could be less than 8% or more than 8%. It could be at the rate at which the parties had their agreement or for that matter at even a higher rate than that.

It is also to be noted that by item (i) the Rules Committee could prescribe rates of interest in respect of all debts including judgment debts and for any period whether before or after judgment.

However, the only existing rule made pursuant to item (i) is rule 12 to Order 42 of the Rules of the High Court which reads as follows:

"Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the court directs, such interest to be calculated from the date of judgment until the judgment is satisfied."

It is to be noted that this rule has no general application, being restricted to judgment debts only and only for the period from the date of judgment until realization. It makes no distinction between debts in respect of which the parties have an agreement in respect of interest and those where there is no such agreement.

Per se section 16 does not give the courts any power to award interest. Without rules made thereunder the section provides no power to the courts. Thus the only power that the courts have pursuant to section 16 is that given to them by the only rule made thereunder which exists, which is Order 42 rule 12 which as has been seen is pretty limited in scope.

However, in spite of the limited application of Order 42 rule 12, it has been the practice of the courts to award interest on the whole or any part of a debt for the whole or any part of the period between the date that the cause of action arose and the date of judgment. This could always have been done by virtue of the common law but is now done pursuant to section 11 of the Civil Law Act of 1956 which reads as follows:

"In any proceedings tried in any court for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section –

(a) shall authorize the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange."

It is to be noted that section 11 read without the provisos gives the court an unfettered discretion to award interest but only for the period between the date the cause of action arose and the date of the judgment. It is also to be noted that the effect of proviso (b) is that in respect of any debt upon which interest is payable as of right *e.g.* by virtue of an agreement between the parties, odd as it may at first sight seem, the wide discretion given to the courts by the section is taken away. However, the

courts have not hesitated to award interest on debts or damages for the period between the date that the cause of action arose and the date of judgment even in cases caught up by proviso (b). It has to be presumed that the courts had fallen back on the common law in doing this. Where the parties had an agreement in respect of the rate of interest the courts have always awarded interest on those agreed terms for the period between the date when the cause of action arose and the date of judgment unless there were other statutory prohibitions from doing so in particular cases as in the cases caught up by the provisions of the Moneylenders Act.

My attention was drawn to item 7 to the Schedule to the Courts of Judicature Act which purports to give to the courts a general discretionary power to direct that interest be paid on debts including judgment debts. However, this item does not provide any help to the plaintiff in that the proviso to section 25 of the Act provides that those additional powers given to the courts including the said item 7 are only to be exercised in accordance with any written law or rules of court.

The predecessor to the Rules of the High Court 1980 was the Rules of the Supreme Court 1957 in which Order 40 rule 11 was the rule pertaining to the award of interest. In sub-rule (1) to rule 11, the whole of the provision of section 11 of the Civil Law Act was re-enacted (as it were) to cover the period between the date the cause of action arose and the date of the judgment in respect of debts or damages in respect of which interest was not payable as of right. There was a sub-rule (2) which covered all judgments for the payment of money and prescribed that judgment debts "shall bear interest at the rate of 6% per annum". It is not difficult to see that the position that obtained in respect of interest when the Rules of the Supreme Court 1957 were in force was no different to the current position. It does, however, provide some emphasis for the view that in respect of judgment debts the Rules Committee did not see the need then (as it does not see the need now) to make a distinction between debts in respect of which the parties have an agreement in respect of the rate of interest to be paid and those that have no such agreement. Whether it was a debt of the former or latter kind, then, when the Rules of the Supreme Court 1957 was in force, and now, with the Rules of the High Court 1980 in force, all the courts could award on judgment debts from the date of judgment until realization was 6% and 8% respectively.

The award of 9% interest up to date of realization prayed for and given was beyond the jurisdiction of the court to give. This was not as a result of a clerical error or slip (as was the case in *Armitage* v. *Parsons*[3] that was cited) that could have been corrected pursuant to Order 20 rule 11 and in any event no attempt to effect any correction had been made. If the plaintiffs enter judgment in default for more than the sum actually due and do not (or cannot) correct the error, the defendant is entitled *ex debito justitiae* to have the judgment set aside: *Hughes* v. *Justin.*[4] Order 13 rule 8, under which the application was brought, does give the court the power to vary the default order it made instead of setting it aside. Variation of the order would always be made if application to do so could be and is made under the slip rule or even if the error is not one that would come within the compass of the slip rule where the plaintiff applies to correct the error or even where the defendant applies to have the judgment set aside on the grounds that judgment was entered in excess of what the plaintiff was entitled to, provided that the plaintiff concedes the error and gives an acceptable explanation as to how the error came about.

In the instant case, the plaintiff resisted the defendants' application and in all the circumstances the court had no choice but to have the default judgment set aside. It was set aside with costs.

The first defendants had also contended that the judgment entered was irregular in that there was no due service of the writ on the first defendants. The service was purported to have been effected at what was said to be the registered office of the first defendants at Suite 1705, 17th Floor, Wisma Lim Foo Yong, No. 86 Jalan Raja Culan, Kuala Lumpur by A.R. registered post on December 28, 1985. The plaintiffs had relied on a search they had caused to be made at the Companies Registry which showed that the registered office of the first defendants as at June 16, 1983 was at the Wisma Lim Foo Yong address.

For the first defendants, in support of the application to set aside the judgment, it was contended in the affidavit of one of its directors, Haji Abdul Razak bin Abdul Majid, affirmed on January 20, 1986 that the registered office "is at Suite 805, 8th Floor ENE Plaza, Jalan Pudu, Kuala Lumpur". The result of a "search" was exhibited. However, neither the affidavit of Haji Abdul Razak nor the search exhibited by him demonstrates that the registered office was not as

at the date that the writ was posted to the first defendants at the address shown in the search made on behalf of the plaintiffs.

The first defendants did not succeed in satisfying me that due service of the writ had not been effected. Clearly as at January 16, 1983 the registered office of the first defendants was at Wisma Lim Foo Yong. Haji Abdul Razak's affidavits and the result of the search exhibited by him reveal that as at January 20, 1986 the registered office was at ENE Plaza. He does not say when the change took place and accordingly just as the plaintiffs had appeared to have done, the court also had to and relied on the results of the search made on behalf of the plaintiffs and concluded that on the date the service of the writ was effected the registered office of the first defendants was at the Wisma Lim Foo Yong address.

Order accordingly.

Solicitors: *Rashid & Lee; Wong Sam Nuck & Co.*

HOPEWELL CONSTRUCTION CO. LTD. v. EASTERN & ORIENTAL HOTEL (1951) SDN. BHD.

[O.C.J. (Zakaria Yatim J.) August 8, 1986]

[Kuala Lumpur – Originating Summons No. C78 of 1984]

Contract – Non-compliance with Companies Act 1965 – Whether void and illegal – Contracts Act 1950, s. 24 – Companies Act 1965, s. 332.

Companies and Corporations – Foreign company – Non-compliance with Companies Act – Whether contract entered into void and illegal – Contracts Act 1950, s. 24 – Companies Act 1965, s. 322.

The plaintiff is a company incorporated in Hong Kong. On May 11, 1982, the plaintiff entered into a contract ("the said contract") for the construction of a building in Penang. Subsequent to entering into the said contract, the plaintiff took possession of the building site on October 1, 1982. The plaintiff carried out certain works and was paid for the works carried out. Certain disputes then arose between the parties to the said contract. The dispute before the court now is whether the said contract is void because the plaintiff, being a foreign company, did not register itself in Malaysia as a foreign company pursuant to the provisions of the Companies Act 1965. With regard to the other disputes between the parties, the plaintiff wishes that these disputes be resolved by arbitration as stated in prayer 2 of their claim, if the court holds that the said contract is a valid contract.

The question also arose as to whether the contract was void because it was against public policy.

Held: (1) in order to render the said contract void under section 24(b) of the Contract Act 1950, there must be a sufficient nexus between the provisions of the Companies Act and the said contract. In the present case, there is nothing in the Companies Act which prohibits the making of the said contract. The Act does not lay down any requirement which a foreign company must comply before entering into such contract. There is therefore no sufficient nexus between the Companies Act and the said contract. The contract in question is a valid contract under section 24(b) of the Contracts Act 1950;

(2) the contract is also not opposed to public policy under section 24(e) of the Contracts Act 1950;

(3) an order in terms of prayer 2 should also be granted.

Cases referred to:

(1) *Curragh Investments Ltd.* v. *Cook* [1974] 1 W.L.R. 1559, 1563.
(2) *Asia Television Ltd. & Anor.* v. *Viwa Video Sdn. Bhd.* [1984] 2 M.L.J. 304, 305 & 306.
(3) *St. John Shipping Corporation* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267.
(4) *Theresa Chong* v. *Kin Khoon & Co.* [1976] 2 M.L.J. 253.

ORIGINATING SUMMONS.

Robert Lazar for the plaintiff.

Y. M. Chin for the defendant.

Cur. Adv. Vult.

Zakaria Yatim J.: This is an application by the plaintiff by originating summons seeking the order of the court:

(1) for a declaration that the contract dated May 11, 1982 and entered into between the plaintiff and the defendant was valid and effectual until such time as it was properly determined by either party notwithstanding the fact that the plaintiff was at all material times a company incorporated under the laws of Hong Kong and was not registered as a foreign company in Malaysia pursuant to the provisions of the Companies Act 1965;

(2) that Hopewell Construction Co. Limited is entitled to request the president or vice-president for the time being of the Pertubuhan Akitek Malaysia to nominate an arbitrator pursuant to the provisions of clause 34(1) of the conditions of the said contract, for the purposes of determining the disputes which have arisen between the parties as described in the notice of disputes contained in Hopewell Construction Co. Limited's application.